SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 968

STATE OF NEW YORK,
Appellant,

v.

UNITED STATES OF AMERICA, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

BRIEF IN OPPOSITION TO MOTIONS TO AFFIRM

LOUIS J. LEFKOWITZ
Attorney General

RUTH KESSLER TOCH
Solicitor General

DUNTON F. TYNAN
Assistant Solicitor General
The Capitol
Albany, New York 12224

MATTHEW A. TIFFANY
Assistant Attorney General
65 Court Street
Buffalo, New York 14202

WALTER J. MYSKOWSKI
712 Ring Building
1200 18th Street, N.W.
Washington, D. C. 20036
Attorneys for Appellant

249 Press of Fremont Payne, Inc., 80 Washington St., N. Y.—BOwling Green 9-8153

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Statement

The questions presented are substantial and novel in that the district court, while affirming the Commission's report and order, evidently rejected the "rationale" of the Commission's decision; based its affirmance upon grounds not relied upon by the Commission; and failed to review the record in the light of the burden of proof placed upon the railroads by statute.

The district court dismissed the complaint challenging the decision and order of the Interstate Commerce Commission which found reduced rail rates on grain and grain products from Pittsburgh, Pa., to nine Eastern base points in

trunkline territory[1] to be just and reasonable and otherwise lawful. The reduced rates, which are lower than the rates from all other points adjoining Pittsburgh and on a lower basis than the rates from most Central Freight Association territory origins[2] to the same destinations, were published to induce the establishment of a grain-milling industry at Pittsburgh.

Argument

1. In the Jurisdictional Statement herein filed by appellant, it was pointed out that section 15 (7) of the Interstate Commerce Act (49 U.S.C. § 15 (7)) provides that "the burden of proof shall be upon the carrier to show that the proposed changed rate . . . is just and reasonable," and that although the Commission had made the ultimate finding that the reduced rates "are just, reasonable, and otherwise lawful" the grounds or evidence presented by the carriers upon which it relied in reaching this conclusion are far from clear. For example, appellant could not ascertain—and the various defendants below could not agree—to what extent the Commission relied upon the Buffalo-Pittsburgh rate comparisons, and whether the reduced rates from Pittsburgh were or were not supposed to be based on the McGraham formula (J. S. 8-9).

In *New Automobiles in Interstate Commerce*, 259 I.C.C. 475, 534 (1945), the Commission set forth the requirements for a minimum reasonable rate, one of the principal criteria being "whether the carrier would be better off from a net-revenue standpoint with it than without it." In this case the Commission concluded that the net-revenue criterion had been satisfied (325 I.C.C. at 678). At oral

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[1] Rochester, Syracuse, Utica, Albany and New York, N. Y.; Philadelphia, Pa.; Baltimore and Cumberland, Md.; and Norfolk, Va.

[2] Roughly the area bounded by the Mississippi and Ohio rivers, the Great Lakes, and an imaginary line extending between Buffalo, N. Y., and Pittsburgh.

argument before the court below, counsel for the Government conceded that this was the "basic thrust of the Commission's report" and admitted that "the Commission's decision must stand or fall on whether the filing of these proposed rates out of Pittsburgh will benefit the carriers' net revenue" (J. S. 10).

Thus, appellant and the Government—but evidently not the intervening appellees—are in agreement that the critical issues are: (1) whether the proponent railroads had met their burden of proof under section 15 (7) by showing that they would be better off from a net-revenue standpoint with the reduced rates than without them, and (2) whether the district court correctly found, or even considered whether, the Commission's judgment on this issue was based upon substantial evidence of record.

Apparently disagreeing with appellant and the Government, the court below expressed "the gravest doubt whether, in empowering the Commission to proscribe a rate as unduly low, Congress meant to *require* it to examine the wisdom of the proponents of rates" where "the sole substantial claim is that because of effects on other traffic the proponents would be better off if the new movement did not occur" and stated that it "need not decide that question, since both Division 2 and the full Commission considered and rejected plaintiffs' contention that the new rates would disadvantage the railroads which had proposed them" (J. S. A6-7). In our Jurisdictional Statement we pointed out that as a consequence, nowhere in the court's opinion is there an examination of whether or not the Commission's finding that the carriers would be better off with the proposed rates than without them was, in fact, based upon substantial evidence (J. S. 11), even though this was the "basic thrust" and the "rationale" of the Commission's decision.

In their Motions to Affirm, both the Government (pp. 4-5) and the intervening appellees (pp. 3-5) contend that the district court considered the net-revenue question and

reviewed the related evidence. The Government does not dispute that the Commission's decision "must stand or fall" on its crucial finding on this issue, but the intervening appellees, evidently realizing the weakness of their position, hedge by saying (p. 3):

> "Appellees are not prepared to concede that the 'net revenue' criteria is a *sine qua non* for finding a rate to be just and reasonable. Nor, in fact, did the Court so hold. . . ."

Thus, as they did in the district court, the two sets of appellees cannot agree as to the grounds on which the Commission based its ultimate finding that the reduced rates were "just and reasonable," with the intervening appellees refusing to concede that the net-revenue finding, on which the Government admitted below that the Commission's decision must stand or fall, was even necessary.

2. In replying to appellant's claim that the court below failed to consider whether the Commission's net-revenue finding was supported by substantial evidence, the Government in its Motion to Affirm (p. 5, footnote 5) and the intervening appellees in their joint Motion to Affirm (pp. 3-4), each quote the same passage from the district court's opinion[*] in an attempt to show that the court did base its

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[*] "One need hardly go beyond the initial illogic of arguing that the railroads will fare better under the depressed ex-lake rates from Buffalo than with the higher rates proposed from Pittsburgh although, for most destinations, the latter yield considerably higher ratios to out-of-pocket cost. See 322 I.C.C. at 237, 242, Apps. B and D. Since most of the grain milled at Buffalo arrives there by water, all the dire effects predicted from the Pittsburgh rates would thus occur in even greater measure if the Buffalo mills succeeded in displacing an equivalent amount of midwestern flour. Still more adverse consequences would ensue for the railroads if failure to develop a milling industry at Pittsburgh should result in the growth of mills in the large seaport markets to which grain can move by all-water routes. Finally, the new Pittsburgh rates to many destinations show a more favorable ratio to out-of-pocket costs than the proportional rates on which flour moves from Chicago and St. Louis, although, of course, for a shorter haul. See 322 I.C.C. 237, 243-44, Apps. B and D."

acceptance of the Commission's judgment on subsidiary findings of fact.

Appellees, however, conveniently omitted from the quoted portion of the court's opinion the sentences immediately preceding and following the part quoted. The preceding sentence reads:

> "If fault can be found with the Commission's predictions in some respects, it can also be found with the plaintiffs'." (J. S. A8)

The sentence immediately following the quoted passage reads:

> "In sum the Commission had substantial basis for finding *the claim* of adverse effect on net revenues to be *too speculative* to warrant disapproval of rates necessary for the movement of traffic, exceeding out-of-pocket costs, and having no harmful effect on any competing carrier." (J. S. A8) (Emphasis added.)

If the immediately prior and subsequent language in the court's opinion is coupled, as it should be, with the language quoted by appellees, it can readily be seen that the court intended only to show that it found some "fault" with "plaintiffs'" predictions and considered them "too speculative." No finding is made that the railroads, upon whom the burden of proof lies under section 15 (7), had affirmatively shown that the reduced rates would improve their net revenues. Without such a finding, the district court could not properly affirm the Commission's report and order, since this was the "rationale" of the Commission's decision.

Moreover, even in the improper context in which the court did discuss facts relating to the railroads' net reve-

nues, it relied largely on comparisons which the Commission found were of "little value."[4]

The fact that the district court refused or failed to look behind the Commission's "judgment" on the net-revenue issue in its proper context as an affirmative element of the proponents' showing, is further made obvious by the following portion of the court's opinion:

> "However, we need not decide that question, since both Division 2 and the full Commission considered and rejected plaintiffs' contention that the new rates would disadvantage the railroads which had proposed them. Plaintiffs say the Commission was as wrong on this as the carriers. They are particularly critical of the statement that the quarter of Bay State's grain requirements which Bay State predicted it would move to the Pittsburgh mill by rail, estimated at 250,000 cwt. per annum, was 'far in excess of the present flour movement to the Pittsburgh area,' 325 I.C.C. at 678; they say with apparent force that this comparison looked

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[4] Bay State, the prospective miller at Pittsburgh, now has plants at Red Wing and Winona, Minn., Leavenworth, Kans., and Clifton, N. J. Its president indicated that its Red Wing plant would be closed if it built a mill at Pittsburgh (R. 430). Intervening appellees in their Motion to Affirm admit that the production of a new mill at Pittsburgh would displace some present flour movements by rail from midwestern mills (p. 3). Yet the railroads presented absolutely no evidence to show how their net revenues would be increased by losing the present rail movements from Red Wing and other midwestern mills to Pittsburgh, which would thereafter move by water, or any comparisons of revenues and costs from Pittsburgh to the Eastern points with those from midwestern mills to the same destinations. The railroads did show the revenues and costs under the ex-lake rates from Buffalo and the proportional rates from Chicago and St. Louis, and the district court relied on these comparisons found in the report of Division 2 (322 I.C.C. 218). The full Commission, however, found such comparisons of "little value" in disapproving the rates to Boston and Rockland (325 I.C.C. at 676-677). Thus, in affirming the Commission's decision, the district court relied largely on comparisons in the report of *Division 2* which the full Commission considered of "little value."

only to Bay State's present shipments of 100,000 cwt. of flour into Pittsburgh and ignored other rail movements of flour from Bay State and competing midwestern mills which may be displaced by barge movements of grain to mills at Pittsburgh stimulated by the new rates. They note also that in its estimate of countervailing benefits from the new rates, the Commission failed to consider that flour milled from grain shipped into Pittsburgh by rail would move east not under the new rates but on low transit balances. But the plaintiffs have too onerous a task when they ask us to overrule the combined judgment of the railroads and the 'tribunal appointed by law and informed by experience.' Illinois Central R. R. v. I.C.C., 206 U. S. 441, 454 (1907). If fault can be found with the Commission's predictions in some respects, it can also be found with the plaintiffs'." (J. S. A7-8)

The district court completely misconstrued and misapplied its review function. The "judgment of the . . . tribunal appointed by law and informed by experience" is not entitled to judicial acceptance merely because the court considered the opponents' contentions, predictions, and claims to be as faulty as the Commission's predictions (J. S. A8). Neither is a burden of proof required by statute and prescribed by the Commission (J. S. 7-9) met by balancing the opponents' alleged faults against those of the Commission, nor the Commission's failure to consider facts of "apparent force" (J. S. A7) excused by the same balance. The only test of whether the Commission's judgment on the net-revenue issue was entitled to controlling weight is whether the record contained a sufficient basis on which the Commission might conclude that the carriers had met their statutory burden of proof; and on this point, the district court's opinion is silent.

In effect, the district court rejected the net-revenue issue as an element of the proponent carriers' burden of

proof, even though counsel for the Government conceded the finding on this question was the "basic thrust" of the Commission's report, on which its decision must stand or fall (J. S. 10). If the court was unable to accept the premise upon which the Commission made its decision, it should have rejected the decision and not the premise. *Columbia Broadcasting System* v. *U. S.*, 316 U. S. 407 (1942).

3. When brought clearly into focus, the district court's decision is nothing more than an effort to disavow the need for and avoid a finding as to whether the proponent carriers had met their burden of proving that they would be better off from a net-revenue standpoint with the proposed rates than without them. The court openly expressed its "doubts" that such a criterion is an indispensable element of the proponents' burden of proof, and proceeded to review the net-revenue issue in a manner which leaves no doubt that it was not considered by the court as a matter to be proven by the proponents.

If the court harbored doubts concerning the wisdom of the Commission's choice of the criteria for a minimum reasonable rate enunciated in *New Automobiles in Interstate Commerce, supra* (J. S. 9), or the fact that the Commission announced those criteria in the conjunctive, giving controlling weight to each, such doubts had no place in its decision. The court was bound to uphold the Commission's decision, if at all, only on the grounds advanced by the Commission. *Burlington Truck Lines* v. *United States*, 371 U. S. 156 (1962); *Securities & Exchange Com'n* v. *Chenery Corp.*, 332 U. S. 194 (1947). Those grounds place upon the proponent carriers the burden of proving that they would be better off with the new rates than without them.

One need look no further than the court's opinion to conclude that the Commission's findings on this point were

inadequate. The district court itself admitted that the Commission failed to consider facts of "apparent force" (J. S. A7) relevant to the net-revenue issue. Without more, it cannot be said that the Commission's judgment was properly supported. *Chicago & E. I. R. Co.* v. *United States*, 107 F. Supp. 118, 126 (U.S.D.C., S. D. Ind., 1952), affrmed 344 U. S. 917 (1953).

CONCLUSION

It is therefore respectfully submitted that the motions to affirm should be denied and that this Court should note probable jurisdiction.

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General

RUTH KESSLER TOCH
Solicitor General

DUNTON F. TYNAN
Assistant Solicitor General
The Capitol
Albany, New York 12224

MATTHEW A. TIFFANY
Assistant Attorney General
65 Court Street
Buffalo, New York 14202

WALTER J. MYSKOWSKI
712 Ring Building
1200 18th St. N. W.
Washington, D. C. 20036
Attorneys for Appellant

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No. 968. Decided March 20, 1967.

PER CURIAM.

The motions to affirm are granted and the judgment is affirmed.